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Accessoriness and Security over Land

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A. INTRODUCTION

The purpose of a security right is to improve the chances of a creditor recovering a debt.¹ This may be by means of a cautionary obligation (guarantee) from a third party (personal security), or by encumbering an asset, typically belonging to the debtor, which can be sold if the debtor defaults (real security). In either case the right in security depends on there being a debt. This is the “accessoriness principle” of security rights. To use the language of the property law doctrine of accession,² the debt is the “principal” and the security is the “accessory”.

The idea may at first sight seem to be a simple one, but in reality the picture is more complicated. As can be seen from the terminology, the subject has been little researched in Scotland. The word “accessory” is familiar, but “accessoriness” is hardly a term that trips off the tongue. Nor is the adjective “accessorial”. When writing in English, Continental scholars have used terms such as “accessoriness”³ and “accessoriness”,⁴ neither of which is recognised by the Oxford English Dictionary. No criticism is intended. Rather, it shows that there is work to be done to catch up with the research of foreign colleagues. This article seeks to make a start from a Scottish perspective, focussing on the extent to which the law of heritable security⁵ complies with the accessoriness principle.

1 J Inst 3.14.4. For a helpful modern discussion, see G McCormack, *Secured Credit under English and American Law* (2004) ch 1.

2 See K G C Reid, *The Law of Property in Scotland* (1996) para 570.

3 S van Erp, “Surety agreements and the principle of accessoriness – personal security in the light of a European property law principle” (2005) 13 *European Review of Private Law* 309.

4 S Nasarre-Aznar, “The Eurohypotheque: a common mortgage for Europe” [2005] 69 *Conveyancer and Property Lawyer* 32 at 37.

5 “Heritable security” is the name used in Scotland to mean security over immoveable property (land).

B. HISTORICAL AND COMPARATIVE CONTEXT

(1) Civil law

The accessoriness principle can be traced back to the Roman law of personal security and real security. Ulpian states the general rule: “In omnibus speciebus liberationum etiam accessiones liberantur, puta adpromissores hypothecae pignora”.⁶ According to Kaser, the dependence of a pledge on the debt it secured had developed as early as the Republic: “Ohne die Forderung entsteht kein Pfandrecht; erlischt sie, geht auch das Pfandrecht unter”.⁷ The development of the accessoriness principle in Roman law is outlined generally by Habersack⁸ and, in relation to personal security, by Zimmermann.⁹ Both take the view that it was a flexible rather than a rigid principle. For example, a cautioner could guarantee a smaller amount than the principal debt, or a pledge could secure a future debt. The dependency of the security on a particular debt was therefore not absolute.

It was the conceptual work of the German Pandectists in the nineteenth century which led to a more dogmatic and strict approach,¹⁰ as evidenced by various provisions in the German Civil Code.¹¹ The accessoriness principle is recognised by the civil codes of other European Civil Law jurisdictions, such as France, Italy, the Netherlands and Spain, in relation to both personal and real security.¹² It is also adopted by the new Chinese Property Code for real securities.¹³

6 [In all cases of release of obligations, ancillary obligations are also released, for example, cautionary obligations, hypothecs and pledges.] D 46.3.43 (translation based on that of Watson et al, 1985).

7 [Without a debt, no pledge could exist; on the extinction of the debt the pledge ended too.] M Kaser, *Das Römische Privatrecht*, 2nd edn, vol 1 (1971) 465.

8 M Habersack, “Die Akzessorietät – Strukturprinzip des europäischen Zivilrechte und eines künftigen europäischen Grundpfandrechts” 1997 *Juristen Zeitung* 857 at 860.

9 R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 121-125.

10 Habersack (n 8) at 860. See further W Mincke, *Die Akzessorietät des Pfandrechts: Eine Untersuchung zur Pfandrechtskonstruktion in Theorie und Gesetzgebung des 19 Jahrhunderts* (1987).

11 For example, BGB §§ 767, 1153. But security for future sums is nevertheless permitted by BGB §§ 1113(2), 1204(2).

12 See generally Habersack (n 8) at 860-861; C von Bar and U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (2004) 354-356. On Italy, see G Alpa and V Zeno-Zencovich, *Italian Private Law* (2007) 147-148. On the Netherlands, see J H M van Erp and L P W van Vliet, “Real and personal security” (2002) 6.4 *Electronic Journal of Comparative Law* (available at <http://www.ejcl.org/64/art64-7.html>); L P W van Vliet, “Mortgages on immovables in Dutch Law in comparison to the German mortgage and land charge”, in M Hinteregger and T Borić (eds), *Sicherungsrechte an Immobilien in Europa* (2009). See also S van Erp, “DCFR and property law: the need for consistency and coherence”, in R Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (2008) 249 at 255.

13 L Chen, “The new Chinese Property Code: a giant step forward” (2007) 11.2 *Electronic Journal of Comparative Law* (available at <http://www.ejcl.org/112/art112-2.pdf>).

A number of systems have, however, adopted so-called *abstract* (or non-accessory) real securities. The best known are the German *Grundschild*¹⁴ (land charge) and the Swiss *Schuldbrief*¹⁵ (letter of mortgage). But similar concepts have been introduced in some Eastern European countries such as Estonia, Hungary and Slovenia.¹⁶ Abstract securities do not require an underlying debt or even a future debt for the real right to be created.¹⁷ The idea is that the holder has the right to be paid a certain amount out of a certain piece of land.¹⁸ A subsequent agreement of the parties is then needed to use the security to secure a particular debt. If that debt is later discharged, the security does not end, but becomes available to be used to secure another debt owed to another creditor.¹⁹ An advantage to that creditor is that he obtains the same rank as the original creditor. Proposals for a uniform immovable security in Europe – a *Euromortgage* – have recommended that this should be an abstract rather than an accessory right. This is discussed further below.²⁰

(2) Common law

In English law the accessoriness principle is found in sources on personal security,²¹ but is less visible in treatments of real security.²² Sir Roy Goode's *Commercial Law* is illustrative of this. Goode describes a guarantee by one party of another's debts as "an accessory engagement",²³ but while his treatment of real security identifies "the subsistence of an obligation"²⁴ as a prerequisite for

14 BGB §§ 1191-1198, in particular § 1192(1). See F Baur, *Sachenrecht*, 17th edn, by J F Baur and R Stürmer (1999) 504-553; J Wilhelm, *Sachenrecht*, 2nd edn (2002) 582-624. Significantly, the BGB was amended in 2008 to make the *Grundschild* more accessory: see J.(3) below.

15 ZGB arts 842-874. See P Tuor, *Das Schweizerische Zivilgesetzbuch*, 13th edn, by B Schnyder, J Schmid and A Rumo-Jungo (2009) 1029-1043. The *Schuldbrief* is currently in the process of being reformed, but its non-accessory nature is to be maintained.

16 See C Schmid and C Hertel, *Real Property Law and Procedure in the European Union: General Report* (2005) 85, 89 (available at <http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/ProjectRealPropertyLaw.shtml>).

17 See, for example, BGB § 1192(1).

18 BGB § 1191(1).

19 In practice, however, lower-ranking creditors often contract with the debtor to prevent this happening. See Van Vliet (n 12) at para 4.1.1.

20 See J below.

21 For example, J O'Donovan and J Phillips, *The Modern Contract of Guarantee* (2003) para 1-20.

22 In the words of P Sparkes, *European Land Law* (2007) 399: "Discussion of mortgages in English law makes little reference to accessoriness in principle". A notable exception is F H Lawson and B Rudden, *The Law of Property*, 3rd edn (2002) 129, but the authors, who both held the Chair of Comparative Law at Oxford, may have been influenced by foreign material. Another exception is *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 at 236 per Lord Hoffmann.

23 R Goode, *Commercial Law*, 3rd edn (2004) 799.

24 Goode, *Commercial Law* 632.

attachment of the security interest, the word “accessory” is nowhere to be found. It is also difficult or impossible to find in the leading English treatments of mortgage law.²⁵ The same result is discovered with North American sources.²⁶ The principle is hidden away in the American Law Institute’s *Restatement of the Law: Property: Mortgages* in the section on the effect of transferring the obligation secured by the mortgage.²⁷ Here there is a reference to a statement from the US Supreme Court that the debt is the principal and the mortgage is the accessory,²⁸ and to a case which quotes a colourful analogy attributed to Professor Chester Smith of the University of Arizona: “The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.”²⁹

It may be asked why the principle is difficult to track in Common Law works on real security. One reason is that a mortgage in its conventional sense means a transfer of the property to the creditor.³⁰ Hence payment of the debt could not by itself extinguish the security. The property has to be reconveyed.³¹ Another reason, suggested by Sparkes, is the division in English law between the common law and equitable rules relating to mortgage.³² At common law the remedy for failure to pay the whole debt on the due date is forfeiture of the land. Accessoriness is irrelevant. The creditor gets the land, no matter whether it is worth more or less than the debt. Under equity, however, the creditor is only entitled to the amount owed and the debtor is entitled to redemption of the property on payment of that sum.³³

25 For example, in W Clark et al, *Fisher and Lightwood’s Law of Mortgage*, 12th edn (2006) the application of the principle is eventually found at para 49.2: “By releasing the debt the security for the debt is released”. Reference is made to *Cowper v Green* (1841) 7 M & W 633. The debt is released, for example, on repayment or where the creditor cancels it. See generally also E F Cousins, *The Law of Mortgages*, 2nd edn (2000).

26 For example, B Ziff, *Principles of Property Law*, 4th edn (2006) ch 11.

27 American Law Institute, *Restatement of Law Third: Property: Mortgages* (1996) § 5.4.

28 *Carpenter v Longan* 83 US (16 Wall) 271, 21 L Ed 313 (1872).

29 *Best Fertilizers of Arizona Inc v Burns* 571 P 2d 675 (Ariz Ct App 1977) at 676.

30 See G Watt, “The Eurohypothec and the English mortgage” (2006) 13 Maastricht Journal of European and Comparative Law 173 at 182, 188. G Bowyer, *Introduction to the Study and Use of the Civil Law and to Commentaries on the Modern Civil Law* (1874) 61 argues that the mortgage should be abolished and replaced with the Civil Law hypothec. See now the Land Registration Act 2002 s 23 under which a mortgage of registered land requires to be effected by means of a charge on the land. On this see Clark et al, *Fisher and Lightwood’s Law of Mortgage* (n 25) paras 5.1-5.7.

31 Clark et al, *Fisher and Lightwood’s Law of Mortgage* (n 25) paras 47.51-47.55. Of course this is the position as regards the Civil Law security of *fiducia cum creditore*: see C.(2)(b) below.

32 Sparkes, *European Land Law* (n 22) 399.

33 *Seton v Slade* (1802) 7 Ves 265 at 273, 32 ER 108 at 111 per Lord Eldon LC.

(3) Mixed legal systems

As the property law of mixed legal systems tends to have been heavily influenced by Civilian concepts, the accessoriness principle is readily recognised. In the case of Louisiana, Yiannopoulos states that real rights are divided into two categories: principal real rights and accessory real rights.³⁴ The former relate to the substance of the property and its use. In that category can be found, for example, ownership and servitudes. The second category are accessory to obligations in respect of which they guarantee payment and therefore relate to the pecuniary value of the property. Examples are mortgages, pledges and privileges. Similarly, a security over land (hypothec) in Quebec is recognised by the Civil Code as being an accessory right.³⁵ The accessoriness principle is well developed in South African law too, it having been influenced by earlier Roman-Dutch law. Voet describes the position in general terms: “Est autem hypotheca accessio quaedam principalis obligationis, sine qua regulariter haud subsistit.”³⁶ It is a principle which is recognised both in case law³⁷ and in the works of modern writers on both personal and real security.³⁸ In contrast, Scottish treatment has been relatively limited.³⁹ Why this is so is unclear, but it is probably part of a wider picture of security law lacking detailed study.⁴⁰

(4) Five rules

From an analysis of the authorities that do exist in Scotland it is possible to state five rules arising from the accessoriness principle in its strict or strong form. First,

34 A Yiannopoulos, *Louisiana Civil Law Treatise: Property*, 4th edn (2001) 427. See also Louisiana Civil Code art 3282 (accessory nature of mortgages).

35 Quebec Civil Code art 2661. See J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Québec* (1994) 21.

36 [A hypothec is a kind of accession to a principal obligation and as a general rule has no existence at all without one.] J Voet, *Commentarius ad Pandectas* (1707) 20.1.18 (translation based on that of Gane, 1956).

37 For example, *African Life Property Holdings v Score Food Holdings* 1995 (2) SA 230 (A) at 238F per Nienaber JA: “Guaranteeing a non-existent debt is as pointless as multiplying by nought.” See also *Kilburn v Estate Kilburn* 1931 AD 501 at 506 per Wessels ACJ (notarial bond); *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259 per Van Wyk JA (mortgage); *Thienhaus v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) at 44 per Wessels JA (mortgage).

38 For example, C F Forsyth and J T Pretorius, *Caney’s The Law of Suretyship*, 4th edn (2002) 37; T J Scott and S Scott, *Wille’s Mortgage and Pledge in South Africa*, 3rd edn (1987) 4; K M Kritzing, *Principles of the Law of Mortgage, Pledge and Lien* (1999) 8-9; P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman’s The Law of Property*, 5th edn (2006) 358-359.

39 W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) 2, 134, 644-654; G L Gretton, “The concept of security”, in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126; W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn, by Lord Coulsfield and H L MacQueen (2007) para 37.04.

40 In the words of R Zimmermann and J A Dieckmann, “The literature of Scots private law” (1997) 8 *Stell LR* 3 at 10: “The largest hole in modern Scottish literature gapes in the area of security”.

there must be a present debt for the security to be constituted. Secondly, that debt must be specific. Thirdly, if the debt is transferred, the security follows it. Fourthly, if the debt is extinguished, so too is the security. Finally, there must be actual indebtedness for the security to be enforced. While these rules have been developed from a study of the Scottish authorities, they are similar to those which have been recognised in other jurisdictions.⁴¹ The rules are now considered in detail with particular regard to Scottish heritable securities, both past and present.

C. RULE ONE: THERE MUST BE A PRESENT DEBT

(1) General

The rule is a seemingly intuitive one. Without a debt there is nothing for a security to secure. As MacCormick has noted, rights of real security “presuppose some obligation owed by a debtor *D* to a creditor *C*”.⁴² Similarly, Sheriff Andrew Bell has described a security without an underlying debt as “a mere husk, empty of any content”.⁴³ Most of the Scottish authorities approach the issue from the end rather than the beginning, stating that discharge of the debt means extinction of the security.⁴⁴ An old and a modern decision, however, make the point. In the 1791 case of *Nisbet’s Creditors v Robertson*⁴⁵ a heritable security had been granted by a merchant in Scotland to his supplier in Holland for the price of smuggled goods. The contract was obviously a *pactum illicitum* and therefore void. The debtor’s other creditors sought reduction of the security. The Court of Session duly reduced it. Lord President Campbell asked: “What better is this debt

41 See D Medicus, “Durchblick: Die Akzessorietät im Zivilrecht” 1971 Juristische Schulung 497. He refers to rule 1 as “accessoriness of origin”, rule 3 as “accessoriness of competency” (the holder of the claim is also entitled to the security), rule 4 as “accessoriness of extinguishment”, and rule 5 as “accessoriness of enforcement”. He also mentions “accessoriness of scope”: the scope of the security is determined by the scope of the claim. See also O Stöcker, “The Eurohypothec – accessoriness as legal dogma?”, in A Drewicz-Tulodziecka (ed), *Mortgage Bulletin 21: Basic Guidelines for a Eurohypothec* (2005) 39 at 46 (available at http://www.en.chipoteka.pl/corporate_site/publications). See also O Stöcker, “Die Eurohypothek” (2007) 14 Jahresheft der Internationalen Juristenvereinigung Osnabrück 61 at 65.

42 N MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) 144. See too *Dempster v Nevay* (1750) Mor 10290 at 10293 where the court held that “a security cannot be without a subsisting debt which is secured”, and *McCutcheon v McWilliam* (1876) 3 R 565 at 569 per Lord Curriehill (“The debt must be regarded as the principal, and the lands merely accessory as security”). More recently, see *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 52 per Lord Hamilton. See also Voet, *Commentarius ad Pandectas* (n 36) 20.1.18.

43 *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129 per Sheriff Principal C G B Nicholson QC quoting Sheriff Bell who heard the case at first instance.

44 See F below.

45 (1791) Bell’s Octavo Cases 349, (1791) Mor 9554.

for being heritably secured? It can be no better; and the only question is whether it was good originally?”⁴⁶

The more recent decision is *Trotter v Trotter*.⁴⁷ This was a divorce action. The husband appealed to the sheriff principal, arguing that the sheriff had made too high an award of financial provision to the wife, to the extent of around £7000. An order from the court was sought requiring the wife to grant to him a standard security over the former matrimonial home, now hers, for that sum. The appeal was refused. In his judgment, the Sheriff Principal (C G B Nicholson QC) stated:⁴⁸

When this matter came before myself in the course of the appeal hearing I raised a different, and more fundamental, difficulty which I have in relation to an order for the granting of a standard security in the present case. That difficulty arises from the fact that the defender’s pleadings do not contain any crave for payment of a capital sum to him by the pursuer . . . [My difficulty] arises from the fact that, as I understand it, any security, and in particular a standard security, must of necessity involve a debt or obligation owed by a debtor to a creditor. But, if no order is pronounced against the pursuer for payment by her of a capital sum to the defender, there is, as I see it, no way in which the relationship of debtor and creditor can be constituted with the consequence that there can be no debt which can properly be secured by the grant of a standard security.

This lucid statement underlines the importance of the constitution of the principal debt before there can be a valid grant of security. The need for such a debt is set out in the legislation which governs the only immoveable security now available in Scotland, the standard security: “A grant of any right over land or a real right in land *for the purpose of* securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security”.⁴⁹ Thus, the reason for the security is to secure a debt. Without a debt it has no purpose.

The legislation provides for two forms of standard security.⁵⁰ In form A both the debt and the security are set out. It is normally used in residential transactions. In contrast, in form B, which is more commonly used for commercial property, only the security element is present. Nevertheless, the need for a debt is made clear by the wording of form B which requires specification of the nature

46 (1791) Bell’s Octavo Cases 349 at 355.

47 2001 SLT (Sh Ct) 42. For discussion, see K G C Reid and G L Gretton, *Conveyancing 2001* (2002) 90-92.

48 2001 SLT (Sh Ct) 42 at 47.

49 Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3) (my emphasis).

50 1970 Act s 9(2), Sch 2.

of the debt and the instrument constituting it. The “debt” does not have to be monetary, as the definition includes an obligation *ad factum praestandum*.⁵¹

Although the debtor is normally the owner of the subject matter of the security, this does not necessarily have to be the case. It is competent in Scotland, as in many other jurisdictions, for a third party to grant the security.⁵² The point is exemplified by *Smith v Bank of Scotland*⁵³ and its subsequent stream of case law involving (usually) wives granting standard securities over their share of the matrimonial home in respect of the business debts of their husbands.⁵⁴ Thus while the accessoriness principle requires that the creditor in the debt and the creditor in the security are one and the same, it does not require that debtor and the owner of the security subjects are identical.⁵⁵ The law on third party security is rather undeveloped in Scotland, but accessoriness is important to it. The effect is that a defence available to the debtor, such as that the debt does not exist or is voidable because of fraud, will be available to the security provider too.⁵⁶

A fundamental issue is whether the debt must be in existence at the time that the security is constituted, in other words be a *present* debt. If it is possible for *future* debts, that is to say debts contracted after the security, to be covered then the accessoriness principle is weakened. To consider this fully necessitates a historical study.

(2) Old forms of heritable security

(a) Pre-1696

The history of heritable security in Scotland has never been authoritatively traced.⁵⁷ In medieval times the law on security made little distinction between moveable property and land. Both were pledged, the old Scottish word for pledge being “wad”.⁵⁸ By Stair’s time the pledge of land had developed into the wadset.⁵⁹ This required that the land be conveyed to the creditor, who, under the feudal

51 1970 Act s 9(8)(c). For discussion, see Gretton (n 39) at 128-129; D J Cusine and R Rennie, *Standard Securities*, 2nd edn (2002) 28.

52 Cusine & Rennie, *Standard Securities* (n 51) para 3.07; D A Brand, A J M Steven and S Wortley, *Professor McDonald’s Conveyancing Manual*, 7th edn (2004) para 21.8; G L Gretton and A J M Steven, *Property, Trusts and Succession* (2009) para 20.19. See also, for example, Codice civile art 2808 (Italy); Louisiana Civil Code art 3295; Quebec Civil Code art 2681.

53 1997 SC (HL) 111.

54 G L Gretton and K G C Reid, *Conveyancing*, 3rd edn (2004) para 1-11.

55 R G Anderson, *Assignment* (2008) para 2-11.

56 Analogous authority exists in respect of personal security. See Gloag & Irvine, *Rights in Security* (n 39) 648-649.

57 Reid, *Property* (n 2) para 112 (G L Gretton).

58 A J M Steven, *Pledge and Lien* (2008) paras 3-19-3-21.

59 Stair, *Inst* 2.10. See also Bankton, *Inst* 2.10.4-42.

system, had to be infeft.⁶⁰ The debtor was known as the “reverser” and his right to a reconveyance of the land upon payment of the debt was declared by statute in 1469 to be real and thus enforceable against singular successors of the creditor.⁶¹ Following the establishment of the Register of Sasines in 1617 there had to be registration to achieve real effect. Where, however, the deed in favour of the creditor stated expressly that the land was being conveyed in security, the debtor retained ownership and no reconveyance was required.⁶²

An alternative form of early security was the annualrent. Here the creditor was once again infeft in the land, but with the right to an annual payment from it,⁶³ ownership remaining with the debtor.⁶⁴ Originally, there was no personal obligation by the debtor to repay. This meant that the debtor could not discharge the annualrent by payment. Shortly before the Reformation it became practice to add a personal obligation and redemption clause, along with a conveyance of the land itself in security.⁶⁵ The annualrent then became known as the “heritable bond”. Despite the fact that the deed bore to convey the land, ownership remained with the debtor.⁶⁶

The practice developed, for both the wadset and the annualrent, of having a clause declaring that all debts owed by the debtor had to be repaid before the security could be redeemed.⁶⁷ Towards the end of the seventeenth century it became, in Bell’s words, “exceedingly common with country gentlemen whose affairs were in confusion”⁶⁸ to convey their land to a trustee with instructions to pay various debts or to act as cautioner. The land then acted as security for all debts present and future. This put the trustee in a powerful position.

(b) 1696-1970

The legislature viewed these “all debts” clauses as giving an unfair preference to the trustee if and when the debtor became insolvent. The Bankruptcy Act 1696⁶⁹

60 Stair, *Inst* 2.10.2. To be infeft, one had to be recognised by the feudal superior by “taking entry”: see Reid, *Property* (n 2) para 93 (G L Gretton).

61 Reversion Act 1469, Records of the Parliaments of Scotland to 1707 (available at <http://www.rps.ac.uk/>; henceforth RPS) 1469/17: see Anderson, *Assignment* (n 55) para 10-51.

62 Stair, *Inst* 2.10.1.

63 Bell, *Prin* § 908; Reid, *Property* (n 2) para 112 (G L Gretton).

64 Erskine, *Inst* 2.8.31-32, 34.

65 Bell, *Prin* § 909.

66 See W Ross, *Lectures on the Practice of the Law of Scotland*, 2nd edn (1822) vol II, 389; Hume, *Lectures* IV, 394.

67 Bell, *Prin* § 911.

68 Bell, *Commentaries* II, 218. See also *Pickering v Smith, Wright & Gray* (1788) Mor 1155.

69 RPS 1696/9/57. See, for example, *Dempster v Nevay* (1750) Mor 10290.

was therefore passed. It provided that:

... any disposition, or other rights that shall be granted for hereafter for relief or security of debts to be contracted for the future, shall be of no force as to any such debts as shall be found to be contracted after the sasine or infeftment following on the said disposition or right...

The Act was not aimed at *uncertain* debts, but at *future* debts.⁷⁰ What mattered was whether the debt was constituted after registration of the security. Where it was agreed to lend a specific sum before registration but the actual advance of money did not take place until afterwards, the Act did not apply.⁷¹

By the late eighteenth century the wadset and the heritable bond had become outmoded and were being replaced by the new bond and disposition in security. This in essence was a more sophisticated version of the older forms.⁷² As its name suggests, it contained both a personal obligation and a grant of security in the same document.⁷³ Like its predecessor, the heritable bond, and despite the word “disposition”, the bond and disposition in security only gave the creditor a subordinate real right, and the debtor remained owner.⁷⁴ In the nineteenth century it came to be regulated by statute.⁷⁵ The bond and disposition in security, like the earlier securities, was subject to the 1696 Act.⁷⁶

To the rule that the debt must be in existence at the time the security was constituted, there were two exceptions. The first was the bond of cash credit and disposition in security.⁷⁷ This was the product of legislation first passed in 1793⁷⁸ and was regulated latterly by the Debts Securities (Scotland) Act 1856. The reason for the statutory innovation was that the rules against a security for future advances (and uncertain sums, discussed below)⁷⁹ were inconvenient to

⁷⁰ *Newnham, Everett & Co v Stuart* (1794) 3 Pat 345 at 347 per Lord President Campbell.

⁷¹ *Fulton v Lead* (1826) 4 S 740.

⁷² Reid, *Property* (n 2) para 112 (G L Gretton). For a modern account of the bond and disposition in security, see W M Gordon, *Scottish Land Law*, 2nd edn (1999) paras 20-04 ff.

⁷³ For a style, see J Burns, *Conveyancing Practice according to the Law of Scotland*, 4th edn, by F MacRitchie (1957) 451-452.

⁷⁴ Bell, *Prin* § 909; *Campbell v Bertram* (1865) 4 M 23 at 27-29 per Lord Curriehill; G L Gretton, “Radical rights and radical wrongs” 1986 JR 51 and 192 at 204.

⁷⁵ Originally by the Heritable Securities (Scotland) Act 1845 and latterly by the Titles to Land Consolidation (Scotland) Act 1868, the Heritable Securities (Scotland) Act 1894 and the Conveyancing (Scotland) Act 1924.

⁷⁶ Gloag & Irvine, *Rights in Security* (n 39) 69-73.

⁷⁷ See Bell, Commentaries I, 715; II, 220-226; Gloag & Irvine, *Rights in Security* (n 39) 70-71; Gordon, *Scottish Land Law* (n 72) paras 20-84 and 20-85.

⁷⁸ 33 Geo III c 74, s 12. See subsequently 54 Geo III c 137, s 14.

⁷⁹ See D.(2) below.

commerce.⁸⁰ Security for a cash credit, i.e. a bank account,⁸¹ was now permitted provided that a maximum amount was stated in the constitutive deed. This could not exceed the value of the principal sum of the credit plus three years of interest at the rate of five per cent per annum.⁸² The effect was that advances made after the registration of security were not subject to the 1696 Act.

The second exception was the *ex facie* absolute disposition,⁸³ which resembled the *fiducia cum creditore* of Roman law.⁸⁴ Here the land was transferred in absolute terms to the creditor, who became owner. There was, however, an unrecorded back letter which stated that the transfer was truly in security, and set out the debt secured. This could be any obligation. It was competent and typical for there to be a requirement that all sums owed must be repaid before the creditor would reconvey the land to the debtor.⁸⁵ The *ex facie* absolute disposition was not a true real security because the creditor had ownership rather than a subordinate real right.⁸⁶ This left the debtor in a vulnerable position, as the creditor, in George Joseph Bell's words, had "the power to convey his estate from him for ever".⁸⁷ For this reason, according to Alexander Montgomerie Bell, writing in the second half of the nineteenth century, the security was little used other than where the creditor was a bank.⁸⁸ By the 1960s, however, with private money-lending being replaced largely by institutional lending, it had become the typical form of heritable security because of its ability to cover all sums. The accessoriness principle had not only been weakened, it had been removed altogether because the *ex facie* absolute disposition was not a true security.

80 *Campbell's Tr v De Lisle's Exrs* (1870) 9 M 252 at 256 per Lord Justice-Clerk Moncreiff. According to Bell, *Commentaries* II, 221, "[t]he greatest lawyers of the time were consulted" in relation to the problem.

81 According to *Conveyancing Legislation and Practice* (Cmnd 3118: 1966) (the Halliday Report) para 104, bankers regarded the need for the security to relate to a particular account as "troublesome". In fact, the legislation seemed to permit the security to cover more than one account. See the Debts Securities (Scotland) Act 1856 s 7.

82 Debts Securities (Scotland) Act 1856 s 7.

83 See Bell, *Commentaries* II, 714; Bell, *Prin* § 912; A M Bell, *Lectures on Conveyancing*, 3rd edn (1882) vol 2, 1173-1175; Gloag & Irvine, *Rights in Security* (n 39) ch 4; Gordon, *Scottish Land Law* (n 72) paras 20-86 ff.

84 See, for example, J A C Thomas, *Textbook of Roman Law* (1976) 329-330.

85 *Riddel v Creditors of Niblie* (1782) Mor 1154; *Nelson v Gordon* (1874) 1 R 1093; *Scottish & Newcastle Breweries Ltd v Liquidator of Rathburne Hotel Co Ltd* 1970 SC 215 at 217-218 per Lord Fraser.

86 *Gretton* (n 74); *Sexton v Coia* 2004 GWD 17-376, 2004 GWD 38-781, discussed in K G C Reid and G L Gretton, *Conveyancing 2004* (2005) 117-121.

87 Bell, *Commentaries* I, 714. Of course this would be to breach the terms of the back letter, but enforcing it would be pointless against an insolvent creditor or one who had absconded.

88 Bell, *Lectures* (n 83) vol 2, 1175.

(3) Standard security

Between 1964 and 1966 a governmental committee chaired by Professor J M Halliday considered the reform of heritable security. It liked the fact that the *ex facie* absolute disposition could secure all sums, but not that it removed ownership from the debtor.⁸⁹ The bond and disposition in security and the bond of cash credit and disposition in security were also considered to have their problems.⁹⁰ The committee therefore proposed the abolition of the existing forms of security which a debtor could grant⁹¹ and their replacement with a new “statutory security”.⁹² This was given effect by the Conveyancing and Feudal Reform (Scotland) Act 1970,⁹³ which introduced the standard security. Like the bond and disposition in security, the standard security confers upon the creditor a subordinate real right.⁹⁴

The debt which a standard security may secure includes “any obligation due, or which will or may become due, to repay or pay money”.⁹⁵ The prohibition in the Bankruptcy Act 1696 against security for debts contracted after the registration of a heritable security is excluded.⁹⁶ The Halliday Committee considered that the general rules of the law of bankruptcy – presumably the rules on unfair preferences – provided enough protection for other creditors.⁹⁷

Thus a standard security may secure future debts. For example, in 2009 the Bearsden Bank agrees to provide Anne with loan finance. In return she must grant the Bank a standard security in respect of all sums advanced. The security is duly granted and registered in the Land Register, but no money is actually lent to Anne until 2010. The standard security nevertheless comes into existence in 2009. Because it is capable of securing future debts, the accessoriness principle is suspended,⁹⁸ or, perhaps more accurately, modified. Rather than securing an actual debt, it secures a possible debt. It is accessory *in posse* rather than

89 Halliday Report (n 81) para 105. This meant that the value of the Register of Sasines as a public record of landownership was reduced.

90 Halliday Report (n 81) paras 103, 104.

91 The pecuniary real burden, which was reserved rather than granted, was no longer used in practice but arguably survived until its express abolition by the Title Conditions (Scotland) Act 2003 s 117.

92 Halliday Report (n 81) paras 119-128.

93 See J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*, 2nd edn (1977) paras 1-20-1-30.

94 Conveyancing and Feudal Reform (Scotland) Act 1970 s 11, as amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 76, Sch 12 para 30. The original wording left room for doubt as to the nature of the right conferred.

95 1970 Act s 9(8)(c).

96 1970 Act s 9(6). The 1696 Act was repealed by the Bankruptcy (Scotland) Act 1985 s 75, Sch 8.

97 Halliday Report (n 81) para 119.

98 See the South African case of *Kilburn v Estate Kilburn* 1931 AD 501 at 506 per Wessels ACJ.

in esse.⁹⁹ Accessory securities elsewhere, for example the Dutch *hypotheek* or the mortgage in Louisiana, are likewise capable of securing future debts.¹⁰⁰

D. RULE TWO: THERE MUST BE A SPECIFIC DEBT

(1) General

In their treatise on *Rights in Security*, Gloag and Irvine write:¹⁰¹

[A right in security] is always necessarily accessory in nature, being constituted for the merely subsidiary purpose of enabling the person entitled to it to make sure of receiving *a certain sum* which is due to him, if not otherwise, then at all events by means of the right in question.

The requirement for a certain sum gives specificity to the security. The liability of the property (or cautioner) to pay the debt is fixed while, in the case of real security, other creditors can ascertain the extent to which the asset is encumbered and determine if a subsequent security in their favour is viable. To ascertain the extent to which the Scottish law of heritable security adheres to this requirement it is necessary once more to look at the matter historically.

(2) Old forms of heritable security

The law took some time to develop. It did so originally in the context of the pecuniary real burden, a form of security which can be traced back at least as far as Stair.¹⁰² Unlike the wadset and annualrent, the pecuniary real burden was not *granted* by the debtor but was *reserved*, normally by the creditor in a conveyance to the debtor. This was often done where only part of the purchase price had been paid and the burden was used to secure the remainder.¹⁰³ In the early eighteenth century a practice developed of land being conveyed under reservation of a burden securing all the grantor's debts.¹⁰⁴ The grantee tended to be another family member who had agreed to pay the creditors in due course.¹⁰⁵ Bell described this as "contrary to the principles of the common law",¹⁰⁶ but in

99 Reid & Gretton, *Conveyancing 2001* (n 47) 91.

100 BW art 3:231; Louisiana Civil Code art 3298.

101 Gloag & Irvine, *Rights in Security* (n 39) 2 (my emphasis). This is cited in *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 52 per Lord Hamilton.

102 Stair, *Inst* 2.3.54-55.

103 Bell, *Lectures* (n 83) vol 2, 1151.

104 This bears a similarity to the practice which developed for wadsets and annualrents, discussed above at C.(2)(a).

105 For a later example, see *McDonald v Place* (1821) Hume 544.

106 Bell, *Commentaries* II, 218.

a number of cases the arrangement was upheld by the Court of Session.¹⁰⁷ The House of Lords, however, decided it was invalid,¹⁰⁸ on the basis that “no perpetual unknown encumbrance ought to be created on land”.¹⁰⁹ Erskine took the view that the problem with a purported security for all debts was that the identity of the creditors could not be determined from the register.¹¹⁰ But it was the wider view of Bell, “that securities granted for indefinite sums are unavailable”,¹¹¹ that would prevail. Both the debt and the creditor’s name had to be specified.¹¹² This effectively prevented the real burden from securing future debts. The rule against indefinite debts embedded itself generally with regard to heritable security.

Two cases are illustrative. In *Pickering v Smith, Wright and Gray*¹¹³ James King granted a heritable bond to the defenders, who were bankers, for £2500. The bond was registered. By means of an unregistered deed the defenders stated that they had not yet advanced the £2500, but that the bond was intended as security for payments past and future made to King under a cash account which they had opened in his favour. King subsequently became insolvent and the bond was challenged under the Bankruptcy Act 1696.¹¹⁴ The defenders argued that the bond was valid. Their submission was that the maximum amount secured could be seen from the register and therefore there was no prejudice to other creditors. The Court of Session held, however, that the bond was only good for the amount advanced prior to registration. It was observed by the judges:¹¹⁵

The loan of money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non existence, according as the money, during the currency of the cash account should have been paid repaid and paid again.

In their view, a security for a debt which was not fixed was impermissible, even where the maximum extent of the security was specified.

The second case is *Newnham, Everett & Co v Stuart*,¹¹⁶ which reached the House of Lords. Robert Stein granted James Stein a heritable bond for £12,000.

107 For example, *Creditors of Coxton v Duff* (1719), reported in Henry Home, Lord Kames, *The decisions of the Court of Session, from its first institution to the present time. Abridged, and digested under proper heads, in form of a Dictionary*, 2nd edn (1791) vol 2, 66-67.

108 *Lovat v Lovat* (1721) Rob 355; *Duff v Gordon* (1721) Rob 372. The rule was accepted by the Court of Session in *Creditors of McLellan*, July 1734, unreported: see Bell, *Commentaries* I, 730.

109 *Newnham, Everett & Co v Stuart* (1794) 3 Pat 345 at 347 per Lord President Campbell.

110 Erskine, *Inst* 2.3.50.

111 Bell, *Commentaries* II, 218; see also I, 730.

112 *Stenhouse v Innes & Black* (1765) Mor 10264.

113 (1788) Mor 1155.

114 The Act is discussed at C.(2)(b) above.

115 (1788) Mor 1155 at 1156.

116 (1794) 3 Pat 345.

The latter sought credit for his business from Newnham, Everett & Co, who were bankers. They required the bond to be assigned to them. No definite sum was specified in the deed of transfer, but it was provided that James Stein was entitled to a credit account. The bankers advanced substantial amounts before the transfer of the bond was registered and a further sum of £16,253 afterwards. James Stein became insolvent. Unsurprisingly, the bankers' security was held to be invalid as regards the £16,253 because of the 1696 Act. Additionally, it was found to be ineffective in securing the earlier sums because it was an indefinite security.

The rule that there could not be a security for an indefinite sum was accepted to apply to the bond and disposition in security in the same way as it applied to its predecessors.¹¹⁷ In the words of Lord Rutherford Clark, "Nothing can be more fixed in our law that a real security cannot be given for an indefinite sum of money".¹¹⁸

The bond of cash credit and disposition in security and the *ex facie* absolute disposition did not, however, follow the specific debt rule. In the latter no maximum amount had to be specified. As was seen above, however, in the former the requirement for a maximum amount meant that there was not a complete repudiation of specificity.¹¹⁹ Immoveable securities for a fluctuating debt, but with a requirement that the maximum amount secured must be stated, exist in a number of modern legal systems.¹²⁰ These include the Dutch *hypothek*,¹²¹ the French *hypothèque*,¹²² the German *Höchstbetragshypothek*,¹²³ and the South African covering bond.¹²⁴ Such securities emphasise a distinction between the *actual debt* (the sum owed by the debtor) and the *secured sum* (the maximum amount which can be secured). It is the second which is the most important to third parties who seek a subsequent security over the property.

117 *Tod v Dunlop* (1838) 1 D 231; Bell, *Lectures* (n 83) vol 2, 1159; Gloag & Irvine, *Rights in Security* (n 39) 67; A Menzies, *Conveyancing according to the Law of Scotland*, revised J S Sturrock (1900) 870.

118 *Smith Sligo v Dunlop & Co* (1885) 12 R 907 at 915.

119 See C.(2)(b) above.

120 See generally C G van der Merwe and E Dirix, "A comparative law review of covering bonds and mortgages securing fluctuating debts" 1997 *Stell LR* 17.

121 BW art 3:260.

122 Code civil arts 2421, 2423.

123 BGB § 1190.

124 See G Pienaar and A J M Steven, "Rights in security", in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 758 at 771-772. But Scottish bankers informed the Halliday Committee that the need for a maximum amount "introduces an element of rigidity which is often inconvenient": see Halliday Report (n 81) para 104. The expression "they would say that" comes to mind.

(3) Standard security

In respect of standard securities, the 1970 Act also disappplied the common law requirement for the security to be for a specific amount,¹²⁵ it being viewed by the Halliday Committee as “unduly stringent and often quite unsuited to modern conditions”. How “modern conditions” differ from older conditions is not explained. The Committee merely notes that the *ex facie* absolute disposition achieved this “without serious prejudice”¹²⁶ and that English law apparently has no such restriction.¹²⁷ The result is that the standard security does not obey the rule that a security must be for a specific debt. Standard securities in practice are normally granted for “all sums” – in other words, the total indebtedness to the creditor is secured.¹²⁸ In the USA this type of provision is referred to as a dragnet, anaconda, cross security or omnibus clause.¹²⁹

E. RULE THREE: THE SECURITY FOLLOWS THE DEBT

(1) General

Where the debt is assigned, the general rule is that any accessory rights are automatically transferred with it.¹³⁰ The rule is *accessorium sequitur principale*.¹³¹ So for example, where a debt is secured by a bond of caution, the cautioner remains liable where the debt is assigned.¹³² The rule presents particular challenges for heritable security because of its dependence on registration.¹³³ The transfer of a debt requires mere intimation to the creditor.¹³⁴

¹²⁵ Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(6).

¹²⁶ Halliday Report (n 81) para 119.

¹²⁷ On the modern English law, see the Land Registration Act 2002 s 49, and K Gray and S F Gray, *Elements of Land Law*, 5th edn (2009) paras 6.5.19-6.5.21.

¹²⁸ Gretton & Reid, *Conveyancing* (n 54) para 19-09.

¹²⁹ Van der Merwe & Dirix (n 120) at 21. “Anaconda” suggests the debtor being suffocated by the debts in the same way as the snake suffocates its prey.

¹³⁰ Stair, *Inst* 3.1.17; Bankton, *Inst* 3.1.7; Erskine, *Inst* 3.5.8; Anderson, *Assignment* (n 55) para 2-01; Steven, *Pledge and Lien* (n 58) para 4-18.

¹³¹ [The accessory follows the principal.] See W Bell, *Dictionary and Digest of the Law of Scotland*, 7th edn (1890) sv “Accessorium sequitur principale”; Trayner’s *Latin Maxims*, 4th edn (reprinted with an introduction by A G M Duncan, 1993) 8. See also *Comments by Scottish Law Commission on Consultation Paper by DTI on Security over Moveable Property in Scotland (November 1994)* (1995) 43. In fact the maxim can be used more widely to express the accessoriness principle in general.

¹³² *Lyell v Christie* (1823) 2 S 288 (NE 253).

¹³³ But see *Halifax plc v Gorman’s Tr* 2000 SLT 1409, criticised by G L Gretton, “The integrity of property law and the property registers” 2001 SLT (News) 135.

¹³⁴ *Drummond v Muschet* (1492) 1 Balfour 69, Mor 843; *A v B* (1540) Mor 843; Stair, *Inst* 3.1.6; Reid, *Property* (n 2) para 656; Anderson, *Assignment* (n 55) ch 6. See also P Nienaber and G Gretton, “Assignment/Cession”, in Zimmermann, Visser & Reid, *Mixed Legal Systems* (n 124) 787 at 792-804.

Take the following example.¹³⁵ Robert borrows £100,000 from Suzanne and grants a standard security in her favour which is duly registered. Suzanne subsequently assigns the debt to the Tom. The assignation of the debt is intimated to Robert on Monday, but the assignation of the security is not registered until Friday. Does the *accessorium sequitur principale* rule mean that the security actually transfers on Monday? The answer is important if Suzanne acts fraudulently and assigns the debt to Una as well as to Tom. Is intimating first sufficient or is registration also required for Tom to prevail against Una? The *accessorium sequitur principale* rule is also problematic in the converse situation, where the assignation of a standard security is registered but there is no intimation to the debtor. Before considering what the answers may be as regards a standard security, consideration is given to the rule in the context of the earlier heritable securities.

(2) Old forms of heritable security

Naturally, the rule that the security follows the debt did not apply to such older forms of security as involved the land being transferred to the creditor, notably the wadset (if the deed did not disclose that the transfer was in security) and the *ex facie* absolute disposition. As regards those which were true securities, the position varied.

At common law, the pecuniary real burden was transferable by assignation of the secured debt and intimation to the debtor.¹³⁶ Registration of the assignation, although possible,¹³⁷ was not required. There are examples of the assignation expressly referring to the real burden as well as the debt.¹³⁸ Again, however, this was not mandatory. Bell wrote that: “A simple assignation intimated to the holder of the burdened infertment is sufficient to transfer the right of the debt, and is followed by the real lien as an accessory”.¹³⁹ The case of *Baillie v Laidlaw*,¹⁴⁰ where the assignation made no mention of the real burden, confirms this. The pecuniary real burden therefore subscribed to the *accessorium sequitur principale* rule. The law was changed by statute in 1874,¹⁴¹ presumably because

¹³⁵ For this and other problem cases, see Anderson, *Assignation* (n 55) para 2-12.

¹³⁶ *Lamont v Lamont's Creditors* (1789) 3 Ross LC 35; *Miller v Brown* (1820) Hume 540; *Baillie v Laidlaw* (1821) 1 S 108; Hume, *Lectures* IV, 405; Bell, *Commentaries* II, 731; Bell, *Lectures* (n 83) vol 2, 1154; Gloag & Irvine, *Rights in Security* (n 39) 175; J P Wood, *Lectures on Conveyancing* (1903) 491.

¹³⁷ *Miller v Brown* (1820) Hume 540, 3 Ross LC 29.

¹³⁸ *Lamont v Lamont's Creditors* (1789) 3 Ross LC 35; *Miller v Brown* (1820) Hume 540, 3 Ross LC 29.

¹³⁹ Bell, *Commentaries* II, 731. “Real lien” was an alternative term for pecuniary real burden: see Steven, *Pledge and Lien* (n 58) para 9-06.

¹⁴⁰ (1821) 1 S 108.

¹⁴¹ Conveyancing (Scotland) Act 1874 s 30.

of a concern about fraud.¹⁴² Recording of the assignation in the Register of Sasines was needed to make the deed effective against third parties.¹⁴³ Intimation was declared to be unnecessary where the assignation was recorded. Like other legislation on the assignation of heritable securities, as will be seen, there is silence on the question of the transfer of the debt. But it is clear that the statutory rule is a departure from *accessorium sequitur principale*. Assignation of the debt cannot itself transfer the real burden.

For the heritable bond, which developed later into the bond and disposition in security, the starting point is the 1626 decision in *Anstruther v Black*.¹⁴⁴ The creditor in a bond which had been recorded in the Register of Sasines assigned the secured debt. The assignation was intimated to the debtor, but there was no express transfer of the bond nor was the assignation recorded. This was held to be ineffective against a creditor of the cedent who adjudged the debt.¹⁴⁵ The court expressed the opinion that if the bond itself had not been recorded, the assignation of the debt would have been valid. Lord Curriehill, commenting on the decision 150 years later, said that, after recording, the debt “has been rendered heritable by being secured over land”¹⁴⁶ and it and the land are now “inseparably connected”.¹⁴⁷ Prior to 1845 the bond and disposition in security and its predecessor, the heritable bond, were transferred by a deed known as a disposition and assignation, in terms of which the debt and bond were assigned and the relevant land conveyed.¹⁴⁸ Lord Curriehill’s view was that the debt could only be assigned by a deed conveying both it and the land. His logic was presumably that, because both debt and security were set out in the same publicly registered document, they could only be transferred together. Thus registration, necessary for the publicity principle of property law, meant that *accessorium sequitur principale* was not applied.

Walter Ross sets out the normal form of deed used to transfer a heritable bond where the creditor has not yet registered the security. The deed first transfers the

142 Commenting on *Miller v Brown* (1820) 3 Ross LC 29, the reporter, Ross, wrote (at 37): “It has been doubted whether the recording be essential, and perhaps without a special enactment it is not; but if so, it certainly ought to be required. Without such a publication a purchaser has no means of securing himself against the combined fraud of the seller and the creditor in the real burden.”

143 The wording of the provision is open to criticism, for either the assignation transfers the right or it does not. There cannot be a transfer simply between the parties.

144 (1626) Mor 829. See Gloag & Irvine, *Rights in Security* (n 39) 123.

145 On adjudication, see G L Gretton, *The Law of Inhibition and Adjudication*, 2nd edn (1996) ch 13. It will be replaced by land attachment if and when the relevant provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007 come into force.

146 *McCutcheon v McWilliam* (1876) 3 R 565 at 569. See also Reid, *Property* (n 2) para 14(4).

147 *McCutcheon v McWilliam* (1876) 3 R 565 at 569.

148 It must be remembered, however, that while the land was “conveyed” the creditor did not have ownership, merely a subordinate real right.

bond and then the debt. Noting that the bond is accessory to the debt and not the other way round, Ross criticises the structure of the deed.¹⁴⁹ He considers that the assignation of an unrecorded bond followed by intimation transfers the debt, but that recording is needed to vest the assignee in the security.¹⁵⁰ Recording also removes the need to intimate. The heritable bond therefore did not obey the *accessorium sequitur principale* rule.

The Heritable Securities (Scotland) Act 1845 provided a statutory form for assignation of bonds and dispositions in security.¹⁵¹ It was not mandatory, but when it was used the wording required to be “as nearly as may be”¹⁵² in the terms of the form. Those terms included an assignation, disposition and conveyance by the granter of (i) the bond and disposition in security and (ii) the land itself.¹⁵³ No mention was made of the debt, presumably because it was encompassed by the “bond”. The assignation had to be recorded in the Register of Sasines for the security to be transferred.¹⁵⁴ The provisions in the 1845 Act were repealed and substantially re-enacted by the Title to Lands Consolidation (Scotland) Act 1868.¹⁵⁵ The Conveyancing (Scotland) Act 1924 provided for a shorter form which provided merely for the assignation of the security, without a disposition of the land.¹⁵⁶ Once again the assignation did not take effect until recorded. It is doubtful that the removal of the disposition of the land changed the rule that recording was necessary to transfer the debt.¹⁵⁷ What is certain is that, even if the debt could pass by intimation alone, the security could not do so without recording. The *accessorium sequitur principale* rule once again did not apply. Rather, it was essentially the reverse: the debt followed the security.

(3) Standard security

(a) General

Assignment of standard securities is dealt with by section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970. This provides that registration, in the Register of Sasines or Land Register, is necessary to vest the security in the

149 Ross, *Lectures* (n 66) vol II, 385-386.

150 Ross, *Lectures* (n 66) vol II, 386-387.

151 Heritable Securities (Scotland) Act 1845 s 1, Sch 1. Oddly, Sch 1 refers to “a Bond or Disposition in Security”. In their treatment of assignation of bonds and dispositions in security, Gloag & Irvine, *Rights in Security* (n 39) 124-125 refer erroneously to the Heritable Securities (Scotland) Act 1847.

152 Heritable Securities (Scotland) Act 1845 s 1.

153 Heritable Securities (Scotland) Act 1845 Sch 1.

154 Heritable Securities (Scotland) Act 1845 ss 1, 6.

155 Titles to Land Consolidation (Scotland) Act 1868 s 124, Sch GG.

156 Conveyancing (Scotland) Act 1924 s 28, Sch K form 1.

157 This is the view of Gloag & Irvine, *Rights in Security* (n 39) 124.

assignee where the statutory forms of assignation set out in Schedule 4 to the Act are used. Whilst the wording of section 14 is permissive – it states that a standard security “may” be transferred using the forms in Schedule 4 – it is not clear how it may be otherwise transferred and in practice this is the only method used.¹⁵⁸ Section 14 is plainly drawn from the provisions for assignation of a bond and disposition in security discussed above, and it can be immediately concluded that the *accessorium sequitur principale* rule is once again excluded. There is a difficulty, however, that is overlooked by the legislation. With the bond and disposition in security, the debt and security were always constituted in the same deed. This is not the case with the standard security because form B standard securities are pure grants of security, and the debt is constituted elsewhere.¹⁵⁹ Before addressing this difficulty, it is necessary to say a little more about the forms used.

(b) *Forms*

Schedule 4 of the 1970 Act, mentioned above, provides for two forms of assignation. Unhelpfully, these are called form A and form B, opening up the possibility for confusion with the form A and form B of Schedule 2 used for constituting the standard security in the first place.¹⁶⁰ Form A is a stand-alone deed. Form B is used to endorse the assignation upon the deed which created the standard security. Either form can be used for either type of standard security, leading to four possibilities.

Possibility (1) is that a form A standard security is assigned by a form A assignation. The assignation should be in duplicate. One copy is intimated to the debtor; the other is registered in the Register of Sasines or Land Register as appropriate.¹⁶¹ Possibility (2) is that a form A standard security is assigned by a form B assignation. Here the standard security, now duly endorsed, is re-registered and a separate instrument of intimation requires to be drawn up to inform the debtor. Possibility (3) is that a form B standard security is assigned by a form A assignation. The assignation is registered. The debt will need to be expressly assigned also, a point made clear by *Watson v Bogue (No 1)*.¹⁶² This may either be done in a separate deed or by adapting the wording of the form

158 Compare here the Bankruptcy and Diligence etc (Scotland) Act 2007 s 42(1), (3) (not yet in force) (assignation of floating charges).

159 See C.(1) above.

160 See generally Anderson, *Assignation* (n 55) para 2-09.

161 This depends on where the standard security itself is registered. Eventually, once all land is transferred to the Land Register all standard securities will be registered there.

162 2000 SLT (Sh Ct) 125. Otherwise, the assignation of the security will be worthless.

A assignation style.¹⁶³ In either case there will require to be intimation to the debtor. Possibility (4) is that a form B standard security is assigned by a form B assignation. The standard security, now endorsed, will require to be re-registered, and there will require to be assignation of the debt, either by adaptation of the endorsement or by separate deed, followed by intimation. The number of possibilities here creates a level of complexity which makes it all too easy to fall into error.

(c) *Effective date of transfer*

As discussed above,¹⁶⁴ the fact that both debt and security are to be transferred causes difficulty. In particular, the consequences of intimating the assignation but not registering it, or conversely, of registering but not intimating it, have to be worked out. Some legal systems – for example, Germany, Louisiana and the Netherlands¹⁶⁵ – follow the *accessorium sequitur principale* rule strictly, so that the security transfers automatically with the debt. That is not the rule in Scotland because of the wording of the 1970 Act section 14. There is consequently the potential to breach the “unity principle” that the debt and security must be held by the same person.¹⁶⁶

For a form A standard security, it is suggested, following the case law on the bond and disposition in security, that registration is needed to transfer both debt and security. Intimation is not required. Indeed intimation (without registration) will not transfer the debt because it is bound up with the security.¹⁶⁷ It will, however, be needed at a practical level to tell the debtor to pay the assignee rather than the cedent (the original creditor).¹⁶⁸ The form B standard security, however, is not like the old bond and disposition because the debt is constituted in a separate document. It is suggested that the debt must be transferred by intimation, while the effect of section 14 is that the security will not transfer until registration. Again, this is a result reached in other systems, for example

163 Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 4 note 2. See *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129 per Sheriff Principal C G B Nicholson QC.

164 See E.(1).

165 BGB § 1153 (in relation to the accessory *Hypothek* and not the *Grundschild*); Louisiana Civil Code art 3312. For the Netherlands, see BW arts 3 : 7, 3 : 82 and 6 : 142 in relation to accessory rights. These provisions do not expressly state that security rights are accessorial but they are accepted to be so by Dutch legal doctrine.

166 Anderson, *Assignment* (n 55) para 2-11.

167 Possibly this rule could be excluded if the assignation expressly provides that the security is not being assigned.

168 Anderson, *Assignment* (n 55) para 2-13.

Austria, Belgium and South Africa.¹⁶⁹ Of course, intimation and registration may well not be simultaneous. There may be a period following intimation and before registration during which the security has a suspended existence and, strictly, secures nothing. That period could be a long one if the assignee forgets to register. But, as has been seen, in other areas the accessoriness principle is not absolute, for example the ability of a standard security to cover future debts.¹⁷⁰ This is another case. To be able to enforce the security, the assignee must eventually get round to registering. Meanwhile the cedent will not be able to enforce the security because the debtor will defend any proceedings on the basis that the debt has been transferred.

The other possibility with the form B standard security is that the assignation is registered prior to intimation. Registration may suffice to transfer the debt if the wording of the assignation is adapted to refer to the debt. Otherwise the security will once more have a suspended existence until the debt catches up. Of course if the debt is arrested in the meantime it will not catch up and the assignee is left in the position of holding a worthless security.¹⁷¹ A stronger accessoriness approach would say that the security cannot transfer until the debt is transferred, but this would undermine the reliability of the Register.¹⁷² Thus suppose Edna assigns a form B standard security to Fiona. Fiona registers, but the debt is not transferred. If the effect is that the security does not transfer, then Edna can, fraudulently, assign again to Gordon. If the debt is transferred to Gordon then he would obtain the standard security even although Fiona is first registered as holder. It is preferable therefore to relax the accessoriness principle and say that the assignation transfers the security to Fiona. At that point the debt which it secures is a *possible* one: the debt which Edna is to transfer to Fiona.

Anderson criticises the current rules, with some justification, and favours the application of the *accessorium sequitur principale* rule.¹⁷³ He argues that, while the publicity of registration is necessary for the creation of standard securities, it is not necessary for their transfer. He points out that the Register is not necessarily accurate because the debt may have been paid but the security not formally discharged. Accordingly, it does not need to be accurate as to who holds

169 On Austrian law, see von Bar and Drobnig, *Interaction* (n 12) 356. On Belgium law, see Anderson, *Assignment* (n 55) para 2-13 n 39. On South African law, see *Lief NO v Dettmann* 1964 (2) SA 252 (A); *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (E); Badenhorst, Pienaar & Mostert, *Property* (n 38) 375-377. See also Van der Merwe & Dirix (n 120) at 26-27.

170 See C.(3) above.

171 See *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129 per Sheriff Principal C G B Nicholson QC.

172 It would also be incompatible with the curative effect of the Land Registration (Scotland) Act 1970 s 3(1)(a).

173 Anderson, *Assignment* (n 55) paras 2-13-2-14.

the security. All that third parties require to know is that a security has been created. Persuasive as this argument is, however, it does not address the value of the Register to potential assignees. Moreover, if the creditor assigns the security twice, there will be the classic race to the Register by the assignees.

It must be stressed the Register is *only* being relied on as to who holds the security. In German law the *Grundbuch* (land register) can also be relied on to the effect that the debt set out in a *Verkehrshypothek* (the main accessory form of heritable security) subsists.¹⁷⁴ German law prefers the assignee in good faith to the debtor. If this approach were applied in Scotland, a debtor who paid the original creditor (cedent) where the assignation of the standard security had been registered but the transfer of the debt not intimated, would have to pay the assignee too.¹⁷⁵ In contrast, in Scotland a defence that the debt has been repaid¹⁷⁶ or is invalid¹⁷⁷ is as good against an assignee of the security as against the original creditor.

F. RULE FOUR: EXTINCTION OF THE DEBT ENDS THE SECURITY

(1) General

One effect of the accessoriness principle is that if the debt is paid or otherwise discharged the security is automatically extinguished.¹⁷⁸ An early example is *Frenchmen v Leirmont*,¹⁷⁹ a decision from 1555. It was held that: “The principal debtour makand payment, his cautioner is releivit, and may not be persewit for the samin”. It is also recognised as a general rule by Bankton, who discusses it in his “Rules of the Civil Law, illustrated and adapted to the Law of Scotland”. Rule 50 is “Cum principalis causa non consistit, plerumque ne ea quidem quae sequuntur locum habent”.¹⁸⁰ Bankton states where a debt is satisfied any pledges or cautionary obligations are extinguished. He goes on to note that the same

174 BGB §§ 892, 1138. The rule was essentially the same for the non-accessory *Grundschild* until August 2008: see generally Van Vliet (n 12) at para 3.8.2.

175 Assuming it was a form A standard security which stated the actual debt.

176 *Rankin v Arnot* (1680) Mor 572 and *Cameron v Williamson* (1895) 22 R 293, both discussed below at F.(2).

177 *Nisbet's Creditors v Robertson* (1791) Bell's Octavo Cases 349, (1791) Mor 9554.

178 The principle may be traced to Roman law and is also found in Roman-Dutch law: see D 20.6.6pr (Ulpian); H Grotius, *Inleidinge tot de Hollandsche Rechtsgeleertheyd* (1631) 2.48.44; U Huber, *Heedendaegse Rechtsgeleertheyd* (1686) 2.51.7; Voet, *Commentarius ad Pandectas* (n 36) 20.6.2; Scott & Scott, *Mortgage and Pledge* (n 38) 165-166.

179 (1555) Balfour, *Practicks* 192.

180 Bankton, *Inst* 4.50, based on D 50.17.178. Bankton's translation is “When the principal obligation does not subsist, the accessory, for most part, cannot have place”. The translation by Watson et al is “When the principal case does not stand, for the most part, those which follow do not have any standing either”.

rule applies in criminal law: if the principal accused is acquitted any alleged accessories cannot be tried.¹⁸¹ The application of this rule to the older forms of heritable security and the standard security is now considered.

(2) Old forms of heritable security

The rule did not apply in the securities where ownership of the land was transferred to the creditor. In such cases a reconveyance was necessary to end the security holder's real right. But it did generally apply in cases where the creditor had a true security, in other words a subordinate real right in the land.¹⁸²

In the 1680 case of *Rankin v Arnot*¹⁸³ a heritable bond had been assigned to the pursuer who registered his right. He attempted to enforce it against the defender, who argued that the security was no longer valid. Payment of the secured debt had already been made to the previous holder of the bond. The pursuer argued that this was irrelevant unless the defender had received "a renunciation of the [bond] and the same had been duly registrate". The court disagreed holding that discharge of the debt led to the extinction of the security without the need for a registered deed.¹⁸⁴ In the words of Ross, the security is brought to an end "with as little ceremony as any other ordinary contraction".¹⁸⁵

The rule applied equally to the bond and disposition in security. The leading case is *Cameron v Williamson*.¹⁸⁶ The creditor had a duly recorded security over certain land for £300. He assigned it to the extent of £200 declaring in the assignation that £100 had already been paid. The assignation was duly recorded. There were a number of further assignations and then the security was eventually discharged and the discharge recorded.¹⁸⁷ A subsequent purchaser of the land objected to the title on the basis that there had not been a formal discharge for the £100 and sought to rescind the contract of sale. The court held that he had no right to do so. The declaration that the £100 had been repaid had been recorded in the public register. In any event, the seller had offered to clear the record. Lord Kinnear and Lord Adam both stated that repayment by itself was sufficient

181 In modern criminal law, no distinction is admitted between principals and accessories: see G H Gordon, *The Criminal Law of Scotland*, 3rd edn, by M G A Christie (2000) vol 1 para 5.04.

182 Stair, *Inst* 2.10.1. See also Erskine, *Inst* 2.8.34.

183 (1680) Mor 572.

184 See Ross, *Lectures* (n 66) vol II, 378: "the debt once in any manner paid, the heritable security must have fallen". See also Hume, *Lectures* IV, 392.

185 Ross, *Lectures* (n 66) vol II, 379.

186 (1895) 22 R 293.

187 A style for the discharge was supplied by the Titles to Land Consolidation (Scotland) Act 1868 s 132, Sch NN, and later by the Conveyancing (Scotland) Act 1924 s 29, Sch K form 3. For any bonds and dispositions in security still in force today, the form of discharge for a standard security should be used with appropriate adaptation: see the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 69(1).

to extinguish the security.¹⁸⁸ Thus at a formal level the accessoriness principle is followed. At a practical level, however, a seller's obligation to produce a clear search in the registers means that a formal discharge is required before the land can be sold.¹⁸⁹ The position was the same for the pecuniary real burden, which was extinguished by payment, evidenced by a formal recorded discharge.¹⁹⁰

(3) Standard security

Like the bond and disposition, the extinction of the debt is all that is required to extinguish a standard security.¹⁹¹ This is the position in many other jurisdictions, for example Belgium,¹⁹² France,¹⁹³ Italy¹⁹⁴ and Louisiana.¹⁹⁵ The 1970 Act, however, provides for a recorded discharge,¹⁹⁶ which has the purpose of "tidying-up"¹⁹⁷ the matter. In *Albatown Ltd v Credential Group Ltd*¹⁹⁸ a purchaser of land was unable to pay the price on the agreed date. The seller was willing to proceed on the basis of the buyer granting a standard security over the land in respect of the amount due. The buyer's obligation, however, was constituted by the contract of sale which, as is the usual practice, contained a clause limiting its enforceability to two years. In an action between the parties after that time, it was held that the obligation no longer subsisted and so neither did the standard security. No formal discharge had been granted. Another example is the so-called "discount" standard security which secures the obligation of a former tenant who has purchased a local authority house to repay the statutory discount on the price if the house is resold within three years. Once the three years have expired so too does the security, without the need for a formal discharge.¹⁹⁹

At one time the rule caused difficulties on the debtor's bankruptcy. By failing to enforce a standard security before the bankrupt's discharge, the creditor appeared to lose the security.²⁰⁰ This was because the discharge released the bankrupt from

188 (1895) 22 R 293 at 298. See also Gloag & Irvine, *Rights in Security* (n 39) 134. The same rule had established itself in South African law: see A F S Maasdorp, "The law of mortgage" (1902) 19 SALJ 102 at 104.

189 Brand, Steven & Wortley, *Conveyancing Manual* (n 52) para 32.35.

190 Bell, *Lectures* (n 83) vol 2, 1154-1155; Gloag & Irvine, *Rights in Security* (n 39) 176.

191 Cusine & Rennie, *Standard Securities* (n 51) para 10.03; R Paisley, *Land Law* (2000) para 11.24.

192 Loi hypothécaire art 108 no 1. See von Bar & Drobnig, *Interaction* (n 12) 357.

193 Code civil art 2488(1).

194 Codice civile art 2878(3).

195 Louisiana Civil Code art 3319(7).

196 Conveyancing and Feudal Reform (Scotland) 1970 s 17.

197 This is the expression used by the English work, Lawson & Rudden, *Property* (n 22) 129.

198 2001 GWD 27-1102.

199 See Cusine & Rennie, *Standard Securities* (n 51) para 10.06.

200 W W McBryde, "The discharge of the debtor and securities" 1991 SLT (News) 195.

all debts owed at the date of sequestration.²⁰¹ The legislation was subsequently amended to address this difficulty and prevent the secured creditor's right from being extinguished.²⁰²

As with rule 1 above (the need for a debt),²⁰³ the position of all-sums standard securities requires to be considered. Suppose a standard security secures the repayment of a bank overdraft. If the balance goes into credit, this will not extinguish the security, for there is the possibility that further sums may be debited and the account has a negative balance once more. The standard security goes into suspension when there is no actual debt.²⁰⁴ Once again, this amounts to a departure from the accessoriness principle in its strong form. As virtually all standard securities are in practice for all sums, rule 4 therefore rarely applies.

G. RULE FIVE: ENFORCEMENT REQUIRES INDEBTEDNESS

This is the most important rule of accessoriness. No matter how flexible an approach is taken to the other rules, accessory securities cannot deviate from the requirement that there must be an actual debt for the security to be enforced against the property of the grantor of the security.²⁰⁵

For securities which require a debt for constitution, such as the bond and disposition in security and the pecuniary real burden, the point is self-evident. For the standard security, which may secure future sums, there is no doubt that a debt is required for enforcement. This may be shown by the case of *J Sykes & Sons (Fish Merchants) Ltd v Grieve*.²⁰⁶ A standard security was granted by Mr and Mrs Grieve to the pursuers for the sum of £20,000. The pursuers attempted to enforce the security. Their action was defended by the Grieves on the basis that the money had been paid to a company and not to them. Mr and Mrs Grieve counterclaimed for the pursuers to be required to grant a discharge of the security. The court held that the terms of the standard security, acknowledging indebtedness, were not conclusive and that the matter should be determined by a proof before answer.²⁰⁷ In another case it was held that a statement in a calling up notice to enforce a

201 Bankruptcy (Scotland) Act 1985 s 55(1).

202 Bankruptcy (Scotland) Act 1993 Sch 1 para 23.

203 See C.(3) above.

204 This principle is recognised expressly by art 2797 of the Quebec Civil Code for the hypothec (the equivalent of the standard security). See Claxton, *Security on Property* (n 35) 21-22.

205 See for example, Louisiana Civil Code art 3292.

206 2002 SLT (Sh Ct) 15. See Reid & Gretton, *Conveyancing 2001* (n 47) 96.

207 See also *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 52 per Lord Hamilton: "The subsisting indebtedness, as ascertained by examination of the private state of affairs between debtor and creditor, [may] .. impinge on the effective scope of the security". Another relevant case is *Gardiner v Jacques Vert plc* 2002 SLT 928 where there was an unsuccessful argument that no debt was due because of a counterclaim against the creditors.

standard security did not require to give the exact amount of debt owed.²⁰⁸ The sum could be finalised at a later stage of the enforcement proceedings.

The position as regards the old *ex facie* absolute disposition (which could secure all sums) is a little more complicated. Normally, the creditor was limited to the actual indebtedness. Thus in *Lucas v Gardner*²⁰⁹ an unrecorded minute of agreement between the parties stated that the disposition was granted for £6500 and all other sums advanced to the debtor. It provided that the creditor could give the debtor one month's notice to repay the debt owed failing which the property would be sold. Three years later the creditor duly gave notice, but the debtor disputed the amount due. He successfully obtained an interdict preventing the creditor from selling until the matter was resolved. But the minute of agreement was crucial to the action. What would have happened if the creditor had conveyed the subjects without assigning the debt and making the disponee bound by the unrecorded agreement? The rule was that if the disponee was in good faith and did not know that the creditor held only under an *ex facie* absolute disposition then he was unaffected by the debtor's rights.²¹⁰ This is not so much a defiance of accessoriness as a consequence of the security not being a true one. As mentioned earlier,²¹¹ the debtor's vulnerability was the reason why this security was generally only used where the creditor was a bank. Similarly, it was one of the grounds behind the abolition of the *ex facie* absolute disposition and its replacement with the standard security.²¹²

H. SUMMARY

Before considering the benefits and drawbacks of accessoriness, it is helpful to summarise the extent to which the securities obey the five rules set out above (see table 1). Of the obsolete securities, the pecuniary real burden was the most compliant. It obeyed all the rules, at least until statute required that assignations must be registered. The bond and disposition in security was not far behind. It, however, failed to comply with rule 3 as assignation and intimation of the secured debt, without recording, were insufficient for transfer. The bond of cash credit and disposition in security strayed far from strict accessoriness. A specific debt was not required: a fluctuating amount up to a maximum figure was permissible. Further, the security could be created before any money was advanced, and settling of the present debt did not extinguish the security because a subsequent

208 *Royal Bank of Scotland plc v Shanks* 1998 SLT 355.

209 (1876) 4 R 194.

210 Gloag & Irvine, *Rights in Security* (n 39) 151-152.

211 See E.(2)(b) above.

212 Halliday Report (n 81) para 105.

Table 1: Extent of compliance with the 5 rules

	Rule 1 Present indebtedness required to create security	Rule 2 Specific debt	Rule 3 Assignment of debt transfers security	Rule 4 Security extinguished if debt discharged	Rule 5 Enforcement requires indebtedness
Pecuniary real burden	Yes	Yes	Yes (at common law)	Yes	Yes
Bond and disposition in security	Yes	Yes	No	Yes	Yes
Bond of cash credit and disposition in security	No	No, but maximum debt must be stated	No	No, further advances will be secured up to maximum	Yes
<i>Ex facie</i> absolute disposition	No	No	No	No, reconveyance required	Yes, but only because of back letter
Standard security	No	No	No	Yes, if fixed debt; otherwise, no	Yes

advance would become secured. The *ex facie* absolute disposition did not comply with accessoriness because it was not a true security. It could secure all sums. Moreover, the discharge of the indebtedness did not extinguish the security. Instead a reconveyance was required and the debtor's protection was limited to what the unrecorded agreement provided.

The standard security was a development from the earlier forms of security and consequently departs to a significant extent from strong accessoriness. It can secure a future and contingent debt or all sums owed by the debtor. Transfer of the secured debt will not transfer the security. The assignment requires to be registered in the appropriate property register. The security will be extinguished by payment of the debt except that, in the case of an all-sums security, it goes into a state of suspension and will spring back into life if the creditor makes a further advance. It is the ability of the standard security to cover all sums, present and future, which means that it departs so much from strong accessoriness. It has been commented by German writers that the effect is to make it

“a non-accessory mortgage for all practical purposes but for the name”.²¹³ This, however, overstates the position. The standard security, like its true security predecessors, complies with the rule that there must be actual indebtedness for enforcement to be allowed. It is conceptually different from abstract securities like the land charge.

I. ADVANTAGES AND DISADVANTAGES OF ACCESSORINESS

(1) Advantages

The main advantage of accessoriness is that it protects debtors. A security restricted to a fixed debt is extinguished by the payment of that debt; an unrestricted, all-sums security is suspended by repayment. In either case, an actual debt must be in existence for the security to be enforced. The debtor is thus protected. In the words of Wachter:²¹⁴

Si l'on examine les activités de législation au sein de la Communauté européenne au niveau du droit privé, l'on constate que la protection des consommateurs occupe une place prépondérante. Par le principe de l'accessorité, le droit du créancier découlant du droit de gage immobilier et celui découlant de créance sont liés, ce qui assure que le créancier ne pourra utiliser la garantie que dans la mesure où il existe un besoin effectif de sûretés. Le principe de l'accessorité comprend donc nécessairement la protection du donneur de garantie.

In Scottish heritable securities, this aspect of the accessoriness principle is most evident in the distinction between assignation and discharge. An assignation must be registered to transfer a standard security.²¹⁵ However, a restricted security is extinguished by payment of the debt alone without registration of a discharge.²¹⁶ This is to protect the debtor immediately on payment. In contrast, suspending transfer of the security until registration protects potential assignees, though without injuring the debtor. The debtor may indeed be in a better position if the debt has been assigned but not the security, because until the security is transferred it can no longer be enforced.²¹⁷

²¹³ Schmid & Hertel, *Real Property Law and Procedure* (n 16) 91.

²¹⁴ [On examining the legislative activity in the European Community in the area of private law, it is noticeable that consumer protection is paramount. By the accessoriness principle, the right of the creditor flowing from the immoveable security, and that flowing from the debt are linked, which ensures that the creditor will only use the guarantee to the degree that there exists an actual need for a security. Therefore, the accessoriness principle necessarily encompasses the protection of the debtor.] T Wachter, “La garantie de crédit transfrontalier sur les immeubles au sein de l’Union européenne: L’Eurohypothèque” 1999 *Notarius International* 174 at 184.

²¹⁵ As was seen above, the rule was the same for its predecessors, although originally not for the pecuniary real burden.

²¹⁶ For example, *Albatown Ltd v Credential Group Ltd* 2001 GWD 27-1102 (discussed above at F.(3)).

²¹⁷ Unless it has been assigned in part. On this complicated issue, see Anderson, *Assignment* (n 55) paras 2-22-2-24.

In addition, accessoriness allows for legal simplicity.²¹⁸ The law determines the fate of the debt and then applies the result to the security. This removes the need to give the debtor a remedy if the creditor attempts to enforce the security where there is no debt subsisting. Otherwise the law might have to provide for a mandatory contract prohibiting such action, as has been proposed for the Euromortgage.²¹⁹ Alternatively, a remedy in delict could be recognised. A third possibility would be to give the debtor a specific defence to such action. In German law, if the non-accessory *Grundschild* (land charge) is enforced where there is no debt, the debtor can seek the transfer of the security to him (*Rückübertragungsanspruch*).²²⁰ This remedy, however, depends on the creditor being bound by the security contract (*Sicherungsvertrag*), i.e. the contract between the original creditor and debtor stipulating that the security will only be used for the secured claim and must be transferred to the debtor on repayment. In the *Grundschild*, the assignee is not automatically bound by the contract. This has led to serious problems and a recent change in the law.²²¹ As Lars van Vliet has pointed out, the rule of accessoriness, that the security lapses if the debt is paid, is a more straightforward and elegant solution.²²²

Similarly, the tying of the security to the debt provides the straightforward rule (rule 3 above) that transfer of the debt means transfer of the security.²²³ Separate transfer rules, therefore, are not required. A number of countries accept this.²²⁴ Scotland, however, does not, in the interests of protecting would-be acquirers of the security who will wish to rely on the Register.²²⁵

Accessoriness operates in a flexible manner. As has been seen, the rules can be modified to allow future and fluctuating sums to be secured. This is not just the position in Scotland, but in other countries too.²²⁶ There is recognition that accessoriness in its pure form is unworkable. It has been observed of countries in the European Union that “accessoriness is the dogma, non-accessoriness the practice”.²²⁷ If this is a reference to strong accessoriness then it is correct, but in

218 Stöcker, “The Eurohypothec” (n 41) at 45.

219 See below at J.

220 See Van Vliet (n 12) at para 3.4. In Germany, non-accessory securities can be held by the owner and subsequently transferred to a creditor. Often the purpose is to give the creditor a higher ranking because the security predates later securities.

221 See below at J.(3).

222 Van Vliet (n 12) at para 3.4.

223 Habersack (n 8) at 862-863.

224 See F.(3)(c) above. See also American Law Institute, *Restatement of Law Third: Property: Mortgages* § 5.4.

225 See E.(3) above. Of course the value of the Register is limited to showing who holds the security. If the debt has been repaid, the security is worth nothing. See Anderson, *Assignment* (n 55) para 2-14.

226 Habersack (n 8) at 863-864; Van Erp (n 3) at 316 n 17.

227 Schmid & Hertel, *Real Property Law and Procedure* (n 16) 89.

truth accessoriness does not have to be strong. It can mean no more than that an actual debt is needed for enforcement. This fundamental rule, at least, is always preserved.

(2) Disadvantages

The disadvantages of accessoriness vary depending on how strict an approach is taken. If, like the old bond and disposition in security, the security is dependent on a specific sum, the creditor's right is restricted so that, if the debt is paid off, the security is lost. It does not matter that the creditor has advanced a further sum to the debtor. A new security in respect of that new debt would need to be obtained. Similarly, variations to the nature of the debt, for example the repayment date, will require variation of the security. This leads to an increase in transaction costs because of the need to renegotiate the security.²²⁸ However, as been seen, such difficulties are removed if the accessoriness principle is applied more flexibly so that security for future and fluctuating sums is permitted. The standard security takes an extremely flexible approach to accessoriness, but more rigid rules are found in other legal systems, such as specifying a maximum amount.

Arguably, accessoriness also has a disadvantage in relation to ranking.²²⁹ Suppose the debtor grants a first-ranking standard security to bank A for £100,000 and a second-ranking standard security to bank B for £70,000. C then makes the debtor a competitive offer of a loan which will be used to repay A. However, C insists on a first-ranking security. The difficulty is that as soon as A is repaid, its security is extinguished and B moves up to become the first-ranked lender. A ranking agreement with B would be required for C to have priority. In practice B may be willing to agree to this because its original position was second-ranked creditor and the agreement simply perpetuates this.²³⁰ German law deals with this problem, for its accessory *Hypothek*, by vesting the security right in the owner if the debt is repaid.²³¹ The concept is known as the *Eigentimergrundschild* (owner's land charge). This is a non-accessory right which can be passed on to the new lender who then obtains the old lender's ranking. Its benefit tends to be undermined by a provision in the loan contract of lower-ranking creditors requiring the owner to discharge it to allow them to improve their rank, a practice homologated in 1977 by an amendment to the German Civil Code.²³² In Scotland

²²⁸ Van Erp (n 3) at 316.

²²⁹ I am indebted here to Van Vliet (n 12) at para 4.1.

²³⁰ Although this would depend on the loans involved.

²³¹ BGB § 1163.

²³² BGB § 1179a.

the doctrine of confusion prevents owners holding true security rights over their own property.²³³

Another solution to the ranking conundrum is to have the original creditor (bank A) assign the debt and security to the new creditor (bank C). Obviously this will require A's consent but A does not lose anything by giving this as the debt is repaid. Of course some properties, typically residential ones, are only subject to the one security so the issue does not arise.

J. EUROPEAN HARMONISATION

(1) Initial efforts

Attempts to harmonise the laws on security over immoveable property in Europe can be traced back to the Segré report of 1966, which argued that harmonisation would help the integration of financial markets.²³⁴ This was followed much later, in 1987, by a report by the International Union of Latin Notaries which used the term "Eurohypothec" for the first time and proposed a model based on the non-accessory German *Grundschild* and Swiss *Schuldbrief*.²³⁵ The Euromortgage, as it came to be known in English,²³⁶ would offer an alternative to the mortgages available under national laws but not replace them. In 1998 the *Verband Deutscher Hypothekenbanken* (VDH, the Association of German Mortgage Banks) set up a working group of academics and practitioners which produced a discussion paper including basic guidelines and a draft code.²³⁷ Once again the main influences were the *Grundschild* and the *Schuldbrief*. In 2004 a group working under the heading "The Eurohypothec: A Common Mortgage for

233 Gloag & Irvine, *Rights in Security* (n 39) 137-139; Cusine & Rennie, *Standard Securities* (n 51) para 10.11.

234 *Het tot stand brengen van een Europese Kapitaalmarkt: Rapport van een door de Commissie van de EEG ingestelde groep deskundigen* (1966) (Report on the Building of a European Capital Market by an expert committee chaired by Professor Claudio Segré). See S van Erp, "A comparative analysis of mortgage law: searching for principles", in M E S Jordán and A Gambaro (eds), *Land Law in Comparative Perspective* (2002) 69 at 70; H G Wehrens, "Real security regarding immovable objects – reflections on a Euro-Mortgage", in A S Hartkamp et al (eds), *Towards a European Civil Code*, 3rd edn (2004) 769 at 770; Watt (n 30) at 173-175.

235 See Nasarre-Aznar (n 4) at 33; Wehrens (n 234) at 773. See also J Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as Mixed Legal System* (2002) 247-248; H G Wehrens, "Der schweizer Schuldbrief und die deutsche Briefgrundschild: Ein Rechtsvergleich als Basis für eine zukünftige Eurohypothek" 1988 Österreichische Notariatszeitung 181. See more generally O M Stöcker, *Die Eurohypothek* (1992).

236 See Wehrens (n 234) at 774. The French equivalent is *Eurohypothèque*.

237 H Wolfsteiner and O Stöcker, "A non-accessory security right over real property for Central Europe" 2003 Notarius International 116.

Europe” was established in Spain.²³⁸ It has further developed the VDH proposals, this time in English, and its suggestions include allowing the same Euromortgage to cover multiple properties in different countries.²³⁹

(2) The approach of the European Commission

Meanwhile the matter has been considered formally at European Union level. In 2003 the European Commission created the Forum Group on Mortgage Credit with a mandate to (i) identify the barriers to the smooth functioning of the internal market for mortgage credit (ii) assess the impact of such barriers on the functioning of the internal market, and (iii) make recommendations to the Commission to tackle these barriers. The group reported in 2004 and made forty eight recommendations.²⁴⁰ It noted that:²⁴¹

In the majority of legal systems in Europe, the link between the principal debt and collateral is very strictly enforced. Any changes to one have a significant effect on the other. Such a strong link between the loan agreement and the security agreement (i.e. strong accessoriness) does not facilitate changes to either. The result is inflexibility, constituting limited economic freedom for the private customer, as well as an obstacle for lenders.

The group recommended that the European Commission should take steps to make the links between mortgage debts and the collateral security more flexible.²⁴² It proposed that in countries where the law provides for strong accessoriness this should be replaced by an accessoriness agreement in the form of a contract between the lender and the owner of the property. The group also recommended that the Commission should investigate the concept of the Euromortgage, for example by way of a study, to analyse its potential to promote the integration of EU mortgage credit markets.

238 See <http://www.eurohypotheec.com/>. See generally Nasarre-Aznar (n 4); O Stöcker, “Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen – Die Eurohypotheke – ein Sicherungsinstrument mit Realisierungschancen” 2006 Wertpapier Mitteilungen: Zeitschrift für Wirtschafts- und Bankrecht 1941.

239 Drewicz-Tulodziecka (ed), *Mortgage Bulletin* 21 (n 41). See also U Drobniog, “Choosing the right approach for European law making – commentary”, in H Eidenmüller and E-M Kieninger (eds), *The Future of Secured Credit in Europe* (2008) 102 at 107-108.

240 Forum Group on Mortgage Credit, *The Integration of the EU Mortgage Credit Markets* (2004) (available at http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/2004-report-integration_en.pdf).

241 Forum Group on Mortgage Credit, *Integration* (n 240) 30.

242 Forum Group on Mortgage Credit, *Integration* (n 240) 32.

In 2005 the European Commission issued a Green Paper entitled *Mortgage Credit in the European Union*.²⁴³ Noting that the concept was not new, it commented that the supporters of the Euromortgage believed that its central aspect was the weakening of the accessoriness principle in order to help the creation and transfer of mortgages and therefore have a positive effect on the whole mortgage credit market, particularly on its funding.²⁴⁴ The Commission stated that it would review the work carried out on the Euromortgage, but the issue was a “complex”²⁴⁵ one because it involved related areas including contract law and property law. The Commission undertook to await the outcome of ongoing initiatives, but in the meantime sought views on the feasibility and desirability of the Euromortgage.

A document published the following year assessed the feedback on the Green Paper. Only a minority of responses had supported the Euromortgage: 19% of financial institutions and intermediaries, 31% of member states, and 43% of other stakeholders.²⁴⁶ Most respondents, including all those representing consumers, wanted further clarification of the concept and therefore neither supported nor opposed it. Many of the responses stressed that further evidence was required to justify the introduction of the Euromortgage and that there was a need to assess the impact on national laws and consumers. A number of responses, including some from member states, stated that the Commission “should consider carefully the principle of subsidiarity in this context”.²⁴⁷ This suggests an opposition to the harmonisation of mortgage law unless it can be fully justified. On the other hand, those respondents who were in favour of the Euromortgage urged the Commission to get on and produce basic legal and economic guidelines. The accessoriness issue attracted a great deal of comment.²⁴⁸ Opponents of the Euromortgage regarded the weakening of the link between debt and security as one of its main weaknesses, while its supporters said that this was an important factor for an integrated and competitive market. Respondents who were less sure wondered whether a non-accessory model was the right one, given the need to protect debtors. They suggested that a comparative analysis of accessory and non-accessory mortgages should be undertaken.

243 European Commission, *Green Paper on Mortgage Credit in the EU* (COM (2005) 327 final) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0327:FIN:EN:PDF>).

244 European Commission, *Mortgage Credit* (n 243) paras 47-48.

245 European Commission, *Mortgage Credit* (n 243) para 48.

246 European Commission, *Feedback on the Consultation on the Green Paper on Mortgage Credit* (2006, available at http://ec.europa.eu/internal_market/finances-retail/docs/home-loans/feedback_gp-en.pdf) 45.

247 European Commission, *Feedback* (n 246) 45.

248 European Commission, *Feedback* (n 246) 46.

In its most recent document, a White Paper on the *Integration of EU Mortgage Credit Markets*²⁴⁹ issued at the end of 2007, the Commission makes no mention of the Euromortgage. Instead it has less ambitious proposals which it hopes will promote cross-border mortgage lending. The Commission had intended to present a recommendation during the course of 2008 inviting member states to take certain steps²⁵⁰ including (i) ensuring that their mortgage enforcement procedures were completed within a reasonable time and that there was online access to their land registers (ii) adhering to the EULIS project,²⁵¹ and (iii) introducing more transparency into their land registers, in particular as regards hidden charges.²⁵² The recommendation has since been delayed because the Commission is working on an analysis of its potential impact under current market conditions. It is expected later in 2009.²⁵³ No doubt the Commission will continue to monitor developments, but for the moment the introduction of the Euromortgage seems to be on hold.

(3) Accessoriness and the Euromortgage

As already mentioned, it has been proposed that the Euromortgage should be a non-accessory security based on the *Grundschild* and *Schuldbrief*. The case, however, for abandoning accessoriness is unconvincing. On the contrary, as consumer protection is one of the EU's aims, it seems logical that the Euromortgage should subscribe to a principle whose very purpose is to protect debtors. The suggestion that accessoriness be replaced with a mandatory contract between lender and borrower, requiring that indebtedness is needed for the security to be enforced, seems to add an unnecessary level of complexity. Moreover, there is the problematic issue of making this contract bind third parties.

Recently, consumers in Germany have been adversely affected by the non-accessory nature of the *Grundschild* (land charge). Banks sold mortgage credit to foreign hedge funds. Land charges were then transferred to the hedge funds without an assignation of the security contract. As a result, the hedge funds

249 European Commission, White Paper on the *Integration of EU Mortgage Credit Markets* (COM (2007) 807 final) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0807:FIN:EN:PDF>).

250 European Commission, *Integration* (n 249) 8.

251 European Land Information Service. This is a consortium of European land registers which aims to provide easy access to information about land ownership and other rights in land by means of the internet: see <http://www.eulis.org/index.html>.

252 That is to say, securities or preferences which do not appear on the Register. To what extent this treads into insolvency law is unclear.

253 See http://www.eurogeographics.org/documents/120209_mortgage_tracking_1.0h_000.pdf.

were not bound by the contracts and could enforce the security based on what was stated in the security document.²⁵⁴ Clearly consumers should not be put at risk in this way. The German Parliament accepted this and the Civil Code (BGB) was amended with effect from 19 August 2008 by what has become known as the *Risikobegrenzungsgesetz* (statute for the restriction of risks).²⁵⁵ A new sub-paragraph 1a was added to § 1192 BGB enabling debtors to plead any defence arising out of the security contract against a subsequent holder of the *Grundschild*. Thus if the debt is discharged prior to the debtor being notified of the transfer, then the debtor is protected from enforcement by the new chargeholder. The result is that there is accessoriness at the point of enforcement. At a practical level this makes the *Grundschild* rather like the Scottish all-sums standard security, although the former's overall conceptual structure remains non-accessory.²⁵⁶ This change to German law is a significant one.

Of course accessoriness can have disadvantages.²⁵⁷ Strong accessoriness increases transaction costs because the security is tied to a specific debt, the repayment of which will necessitate the granting of a new security if a further sum is to be advanced. However, these criticisms are met by a more flexible approach to accessoriness such as that taken by the standard security, which is capable of securing future and fluctuating sums.²⁵⁸ If there is ever to be a Euromortgage, the benefits of accessoriness must be reconsidered, particularly in the light of the recent German experience.²⁵⁹ Sparkes goes so far as to suggest that to proceed

254 S van Erp, "Editorial" (2007) 11.4 Electronic Journal of Comparative Law (available at <http://www.ejcl.org/114/editor114.html>); C Clemente, "Verwertung der nicht akzessorischen Grundschild im Rahmen eines Forderungsverkaufs" (2007) 11 Zeitschrift für Immobilienrecht 737; Van Erp (n 12) at 260; C Clemente, "Neuerungen im Immobiliendarlehens- und Sicherungsrecht" (2008) 12 Zeitschrift für Immobilienrecht 589 at 590-591.

255 See Van Vliet (n 12) at para 3.8.2; Clemente, "Neuerungen im Immobiliendarlehens" (n 254); T Fest, "Eine Revolution der Kreditsicherung mittels Grundschilden, Auswirkungen des Risikobegrenzungsgesetzes auf den Schuldnerschutz" (2008) 12 Zeitschrift für Immobilienrecht 657; P Redeker, "Renaissance der Hypothek durch Abschaffung des gutgläubigen einredefreien Erwerbs bei der Grundschild?" 2009 Zeitschrift für Wirtschaftsrecht 208; P Bülow, "Die Sicherungsgrundschild als gesetzlicher Tatbestand" (2009) 2 Zeitschrift für das Juristische Studium 1.

256 It has been suggested, but ultimately doubted, that German banks may now use the accessory *Hypothek* because the recent changes to the law do not apply to it: see Redeker (n 255).

257 See I.(2) above.

258 E van den Haute, *Harmonisation européenne du crédit hypothécaire: perspectives de droit comparé, de droit international privé et de droit européen* (unpublished doctoral thesis, Free University of Brussels, 2008) para 435.

259 In this connection, a third-way approach has been suggested of the Euromortgage, being non-accessory when it is created but accessory when it is enforced: see Stöcker, "The Eurohypothec" (n 41) at 52; Watt (n 30) at 191. In effect this is now the position as regards the German *Grundschild* following the 2008 reforms.

with a non-accessory model would be “suicidal”.²⁶⁰ He continues: “Any pan-European mortgage instrument should be accessory and impose a formal linkage between the loan and the security; only in that way are domestic borrowers properly protected.”²⁶¹

(4) Wider considerations

On a wider level it may be doubted whether there is a compelling case for the Euromortgage. In its 2007 White Paper, the European Commission admitted that:²⁶²

Limits to the potential for integration should however be acknowledged. The influence of factors such as language, distance, consumer preferences, or lender business strategies cannot be underestimated. . . . The Commission recognises that consumers predominantly shop locally for mortgage credit and that the majority will probably continue to do so for the foreseeable future. The integration of the EU mortgage markets will therefore be essentially supply-driven, in particular through various forms of establishment in the Member State of the consumer.

This is a realistic approach. Other arguments against the Euromortgage may also be mentioned. First, the need for harmonisation of security rights in respect of assets which move across national boundaries is far greater than for land which by its nature is immoveable.²⁶³

Secondly, to make the Euromortgage a success, other related areas such as land law, contract law and insolvency law would also need to be harmonised.²⁶⁴ This seems to be appreciated – amongst others by the Commission – at least to a limited extent. Thus reform of land registration laws has been mentioned.²⁶⁵ But harmonisation would need to go far deeper.²⁶⁶ Take the following example. David owns a flat in Dundee. He is offered mortgage funding by the Bank of

²⁶⁰ Sparkes, *European Land Law* (n 22) 401.

²⁶¹ Sparkes, *European Land Law* (n 22) 401.

²⁶² European Commission, *Integration* (n 249) 3.

²⁶³ See A J M Steven, “The effect of security rights *inter partes*”, in U Drobni, H J Snijders and E-J Zipporé (eds), *Divergences of Property Law: an Obstacle to the Single Market* (2006) 47 at 58-59; G L Gretton, Review of G McCormack, *Secured Lending under English and American Law* (2006) 10 *EdinLR* 172 at 173; Watt (n 30) at 179-180.

²⁶⁴ It is telling that land law is beyond the scope of the Common Frame of Reference Project: see C von Bar, E Clive and H Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* Outline Edition (2009) rule I.-1:101(2)(f). Compare Van Erp (n 12) at 254-261. As to whether security rights in general should be in the DCFR, see G McCormack, “The CFR and credit securities – a suitable case for treatment?”, in A Vaquer (ed), *European Private Law beyond the Common Frame of Reference: Essays in Honour of Reinhard Zimmermann* (2008) 97.

²⁶⁵ European Commission, *Integration* (n 249) 8; Van Erp (n 234) at 86.

²⁶⁶ See Van den Haute, *Harmonisation européenne* (n 258) paras 436-437.

Bulgaria in Sofia. How does the bank ensure that it obtains a good security? It needs to examine David's title. To examine a title requires more than a knowledge of the rules of land registration. It requires an ability to understand real burdens, servitudes, the law of the tenement and so on and so forth. Unless property law as a whole is harmonised, the Bank of Bulgaria will have to use local agents in Scotland to check the title. These agents may as well be asked to prepare a standard security as a Euromortgage. The cost may be little different.²⁶⁷

This is borne out by a third argument. Scotland and England have fundamentally different systems of land law, yet a substantial number of Scottish standard securities are granted in favour of English-based lenders and many English mortgages have Scottish lenders as the creditor.²⁶⁸ It has been argued, however, that:²⁶⁹

The British experience... cannot be considered a good mirror of the European situation. Firstly, whilst English and Scottish legal institutions remain distinct, the difference is not radical, compared to other European legal systems, and both English and Scottish law can be considered rather creditor friendly (for instance, both countries have rather agile and swift procedures for the enforcement). On the other hand, English and Scottish lenders are in general among the most enterprising in Europe. This is widely confirmed by anecdotal [sic] evidence... [A]t the moment there is an ad-campaign on the radio that encourages people who have a house in The Netherlands to borrow money from the Bank of Scotland, the loan to be secured by a Dutch mortgage.

If these are arguments in favour of the Euromortgage, then they do not convince. In the first place, there are radical differences between the fabric of English and Scottish mortgage law, including the fact that Scots law has no separate system of equity. Secondly, if enforcement procedures in other countries are considered too slow then the matter can be addressed at national level, as the European Commission is now proposing in its White Paper.²⁷⁰ Thirdly, Adam Smith would have been delighted by the praise for entrepreneurial Scottish and English lenders. No doubt there are lessons for banks in other countries, without the need to introduce a Euromortgage. In truth, however, the extent of Scottish-English cross-border lending is encouraged by a common language, close geographical

267 Although the fact that the Euromortgage is a familiar concept may make it appeal more to lenders than local securities.

268 In 2006 the largest mortgage lender in the UK was HBOS plc, which was formed in 2001 by the amalgamation of the Bank of Scotland and Halifax plc, the latter being an English lender. The registered office of HBOS was in Edinburgh. In January 2009 it became part of the Lloyds Banking Group.

269 von Bar and Drobnič, *Interaction* (n 12) 361, responding to comments made by Professor George Gretton. I understand from Professor Gretton that he was referring to banking institutions rather than legal institutions.

270 European Commission, *Integration* (n 249) 8.

proximity, and being part of a unified state. These are factors which are not replicated in Europe as a whole. As was seen above, the Commission in its White Paper seems to have some appreciation of this.

K. CONCLUSIONS

The accessoriness principle, which may be traced to Roman law, has established itself as a persistent and pervasive part of the laws of both personal and real security in Europe. In Scotland, it is recognised to varying extents in the old forms of heritable security. The approach taken by the standard security is a flexible one, as both future and fluctuating debts may be secured. The most important rule of accessoriness, that there can only be enforcement where there is actual indebtedness, is obeyed by the standard security as it was by its predecessors. This leads to the protection of debtors. Thus accessoriness has a notable advantage over abstract securities, as the recent changes to the German *Grundschild* demonstrate. If there is to be harmonisation of European mortgage laws then account needs to be taken of this advantage. Nevertheless, the case for the introduction of a Euromortgage has yet to be convincingly made.